United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1175, 75-1176

TO BE ARGUED BY:
JAY GREGORY HORLICK

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

RALPH PRINCIPIE,

Defendant-Appellant.

On appeal from the United States District Court for the Eastern District of New York

APPELLANT PRINCIPIE'S BRIEF

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Of Counsel.

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DOCKET NO. 75-1176

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TABLE OF CASES

QUESTIONS PRESENTED

1. Does the failure to give statutory post-termination notice require suppression?

2. Does the failure to name a known suspect who was participating in the offense which was the subject of the eavesdropping order require suppression?

TABLE OF STATUTES

Section 700.30 of the Criminal Procedure Law of the State of New York sets forth:

> Sec. 700.30 Eavesdropping warrants; form and content
>
> An eavesdropping warrant must contain:
>
> . . .
>
> 2. The identify of the person, if known, whose communications are to be intercepted; . . .

Section 700.50 of the Criminal Procedure Law of the State of New York sets forth:

> Sec. 700.50 Eavesdropping warrants; progress reports and notice
>
> . . .
>
> 3. Within a reasonable time, but in no case later than ninety days after termination of an eavesdropping warrant, or expiration of an extension order, except as otherwise provided in subdivision four, written notic of the fact and date of the issuance of the eavesdropping warrant, and of the period of authorized eavesdropping, and of the fact that during such period communications were or were not intercepted, must be personally served upon the person named in the warrant and such other parties to the intercepted communications as the justice may determine in his discretion is in the interest of justice.

Title 18, United States Code Sec. 2518 sets forth:

> . . .
>
> (4) Each order authorizing or approving the interception of any wire or oral communication shall specify-
>
> (a) the identity of the person, if known, whose communications are to be intercepted; . . .
>
> (8) (d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order of the appli-

cation, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of-

(1) the fact of the entry of the order or the application;
(2) the date of the entry and the period of authorized, approved or dissapproved interception, or the denial of the application; and
(3) the fact that during the period wire or oral communications were or were not intercepted.

UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

RALPH PRINCIPIE, et al,

Defendant-Appellant.

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DOCKET NO. 75-1176

APPELLANT PRINCIPIE'S BRIEF

PRELIMINARY STATEMENT:

Ralph Principie appeals from a judgment of conviction entered on February 10, 1975 after a non-jury trial (Constantino, J.) in the United States District Court for the Eastern District of New York and from the denial of his motion to controvert and suppress evidence obtained pursuant to court ordered eavesdropping. Appellant was convicted of conspiracy and agreeing to violate Title 18, United States Code, Section 495 and Section 1708 by conspiring and agreeing to forge and to utter and publish as true stolen United States Savings Bonds. Appellant was sentenced to a term of imprisonment of four years and a Five Thousand Dollar fine. Appellant is pre sently on bail pending the outcome of this appeal.

STATEMENT OF FACTS

On June 19, 1972 Stanley Reinhardt, at the direction of Leonard Newman, Assistant District Attorney in charge of the Frauds Bureau of the District Attorney's Office of New York County, placed two telephone calls to Joseph Martino at telephone number 377-9840. Said telephone instrument was listed to the 1234 Club at premises 1234 East 12th Street, Brooklyn, New York. (see transcript of hearing pgs. 5-7)

As a result of said conversations, an order permitting interception of telephone connumications transmitted over said telephone instrument was signed by Justice Larry M. Vetrano.(order dated July 5, 1972) The order authorized the District Attorney or his agents to intercept communications of Joseph Martino, his co-conspirators, agents and associates.

A renewal and amendment order was signed by Mr. Justice Vetrano (order dated July 27, 1972) which renewed the order permitting interception of telephone conversations and in addition permitted a listening device to be placed in the premises of the 1234 Club; with the provision that this listening device would be operative only up to 7:30 P.M. of each evening. The named individuals in the order were Joe Martino, Paul Labriola and Ralph, their co-conspirators, agents and associates.

A third order allowing the interception of communications was signed by Mr. Ju stice Vetrano authorizing the interception of telephone conversations of Joseph Martino, Paul Labriola and Ralph, their co-conspirators, agents and associates (order dated Sept-

ember 11, 1972).

A fourth order allowing the interception of communications was signed by Justice Milton Mollen authorizing the interception of communications of Paul Labriola, Ralph Principie, their co-conspirators, agents and associates (order dated September 27, 1972).

The final order was signed by Justice Milton Mollen authorizing the interception of communications of Paul Labriola, Ralph Principie and Joseph Martino, their co-conspirators, agents and associates (order dated October 28, 1972).

A pretrial hearing was held commencing January 28, 1975 (Constantino, J.) the Government's case was substantially as set forth above. In addition, facts concerning the lack of post termination notice was adduced.

On the cross examination of Seargent Bocina of the New York City Police Department, testimony was obtained establishing that on August 17, 1972 the District Attorney's Office knew that the Ralph whose communications were being intercepted in connection with the eavesdropping warrant was in fact, Ralph Principie. The witness testified that only persons who were suspected of being deeply involved in the subject matter of the investigation were the subjects of police surveillance Seargent Bocina read from a Police observation report dated July 26, 1972 indicating that the home of Ralph Principie, 1988 Clove Road, Staten Island, New York was placed under observation by the Police at 8:30 P.M. At approximately 9:15 P.M. Ralph P rincipie was observed parking in front of his home and the observation was discontinued at 10:10 P.M. The testimony of Seargent Bocina establishes that the District Attorney's Office knew that the Ralph whose communications were being intercepted was in fact Ralph Principie and that this knowledge was known to them as early

as August 17, 1972 and possibly as early as July 26, 1972. In spite of these facts the warrants dated July 27, 1972 and September 11, 1972 did not contain the name of Ralph Principie (see transcript of hearing Pages 246-248).

The Government stipulated that Ralph Prinicipie never received written post termination notice of the authorization and interception of his communications though he was a named individual in two of the warrants. It was further stipulated that James Gillmartin, an agent, of the Secret Service would testify that at the time of the arrest of Ralph P rincipie on NOvember 7, 1973 that James Gillmartin had a general conversation with several of the defendants named in this case. The conversation took place in a District Attorney Squad Room, New York County District Attorney's Office, and during the course of a general conversation, Gillmartin stated to the assembled defendants that wire taps were employed by the authorities in connection with their arrests. This was an informal conversation and no formal proceedings, announcements or statements were made by Agent Gillmartin to Ralph Principie (see transcript of hearing pages 358-359).

The Government stipulated that the Police Officers intercepted communications from the listening device installed at the 1234 Club after 7:30 p.m. through midnight on each and every day the listening device was placed at the 1234 Club with the exception of one night, in connection with the eavesdropping warrants dated August 3, 1972 signed by Justice Vetrano.

Judge Constantino denied defendant's motions to controvert the warrants and suppress evidence by decision read into the record on February 10, 1975 in open court. The defendant proceeded

directly to trial after having waived a jury and was convicted under the first count of Indictment 72 CR 972 of violating Title 18 United States Code, Section 495 and Section 1708.

On April 4, 1975 defendant was sentenced to imprisonment for four years and a FIVE THOUSAND DOLLAR fine, and is on bail pending appeal.

POINT ONE

THE TRIAL COURT'S FAILURE TO SUPPRESS THE WIRE-TAP EVIDENCE WAS IN ERROR

In 1967 the Supreme Court of the United States in Berger v. New York 388 US 41 discussed the ancient practice of eavesdropping. The Court traced the history of this type of invasion of the privacy of an individual and in deciding whether or not the New York State statute as it then existed was constitutional, discussed at length the types of eavesdropping that had made history. The Court found as part of its reasoning that eavesdropping pursuant to Court order was no more than a search and seizure, which was for conversations of individuals rather than for physical evidence; but nonetheless protected by the Fourth Amendment. The Court held in that case that there were many improprieties in the statute as it existed. One of the categories found offensive to the Court was the fact that no notice was required by the statute where an eavesdropping order had been authorized by the Court and executed. The Court stated at page 60:

> " Finally, the statutes procedure, necessarily because its success depends on secrecy, has no requirement for notice as the conventional warrants, nor does it overcome this defect by requiring some showing of special facts."

The court further set forth its feeling with regard to the manner in which warrants must be executed. The Court stated at page 63 citing Lopez v. United States 373 US at 464:

> "... it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded. Few threats to liberty exist which are greater than that posed by the use of the eavesdropping devices."

In response to the courts decision, Congress passed Article III of the Omnibus Crime Control Act of 1968. In the United States Code Congressional and Administrative News 1968 the intent of the congress in passing the act set forth

at page 2113:

> " This proposed legislation conforms to the Constitutional standards set out in Berger v New York (87 S.Ct. 1873, 388 US 41(1967) and Katz v. United States (88 S.Ct. 507, 389 US 347 (1967))."

New York State enacted Criminal Procedure Law Article 700 which is based upon the above cited cases and the Federal enactment. Both the State and the Federal statute require that a person named in an eavesdropping warrant be notified in writing within a maximum of ninety (90) days from the time that the order is terminated. It has been agreed between counsel for the defendant and the government that no such notice was ever given to the Defendant, Ralph Principie.

A recent Decision in United States v. Chun 503 F 2d 533 (1974) which discussed United States v. Giordano 94 S.Ct. 820 sets forth the rule with regard to suppression when a statutory requirement has been violated. At page 541 the court stated;

> "In order to require suppression, the particular violation must fall within the scope of § 2518 (10) (a) (i), which has been defined to encompass the
>
> . . . failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." (citing from Giordano)

Although that decision was against suppression it appears that the United States Circuit Court of Appeals have taken divergent views (eg. U.S. v. Donovan 17 Cr L 2027).

New York State law is not as confusing and is the applicable law since the warrant is a state Supreme Court warrant obtained and executed by the District Attorney, New York County.

The New York State law holds that the failure to give the

notice mandated by the statute requires suppression of all evidence obtained pursuant to the order. The leading case in the State of New York on the requirement of suppression of evidence where the defendant is not notified pursuant to statute is People vs. Tartt 71 Misc. 2d 955, 336 N.Y.S. 2d 919. The Court therein found that the defendant was not notified pursuant to statute, and that there had been no order of the Court authorizing postponement of the notice. The case at bar is precisely on point. In People v. Tartt the Court analyzed the newly enacted criminal procedure law as it related to the decision in Berger, and as it had bearing upon the United States Code Title 18 Section 2518(10). The Court also took notice of a United States Court of Appeals, Third Circuit, case, United States v. Eastman 465 F 2d 1057 in which an attempt was made to wiave the notice requirement. The Eastman court held that in view of the fact that notice had not been given suppression would have been ordered even if there was no attempt to waive the statutory notice.

When the question of the Constitutionality of wiretapping is finally decided by the United States Supreme Court, no doubt the practices previously permitted will be standards by which the Act is judged. If indeed wiretapping is the ultimate search and seizure it is subject to the restrictions of the Fourth Amendment. If general searches, limitless searches, secret searches and the like are to be condemned then the provisions of the wiretap statutes must be strictly enforced. The only effective sanction to compel adherence to the statutory mandates is the remedy afforded to the act - exclusion of the evidence obtained in violation of the act.

The Court of Appeals commented on the Tartt Decision in People v. Hueston 34 NY 2d 123, 356 N.Y.S. 2d 272. The Court found as a finding of fact that the defendant had received actual notice within seventy-eight days of the termination of the warrant as extended. The Court held at page 120:

> " The People admit that they did not give the written post termination notice required by the statute. While we may assume that the lack of such notice may further require suppression of the evidence obtained as a result of the warrant
>
> (See People v. Tartt, 71 Misc. 2d 955 336 N.Y. S 2d 919 supra) we believe that the special circumstances in this case compel a different conclusion."

The special circumstances obviously were that the defendant had actual notice within seventy-eight days which placed it within the ninety day limit set forth by statute.

In the case at bar the defendant had no actual notice and by stipulation there was not any type of notice whatsoever until atleast one year had gone by. It can be stated that the defendant was not given personal notice even through a conversation with a Detective since the notice was not being directed toward him. A conversation took place in a large room with many people in it and there is no evidence to indicate that the defendant even heard the statement made by the detective.

The decision in United States v. Giordano 94 Sup. Ct. 820 sets forth when a conversation has been unlawfully intercepted. The Court defines those terms as follows:

At page 1832 the Court stated:

> " The words "unlawfully intercepted" are themselves not limited to constitutional violations and we think Congress intended to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement the Congressional intention to limit the use of interception procedures to those situations clearly calling for the employment of this extraordinary investigative device."

The Court went on to state at page 1833:

> "But the report also states that the section

> provides for suppression of evidence directly or indirectly obtained "in violation of the chapter" and that the provision "should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of oral and wire communications."

The failure of the People to supply the written notice was clearly in violation of the explicit wording of the statute in question. The faulure therefore, must be deemed to be a failure to satisfy one of the statutory requirements that directly and substantially implement the Congressional intent with respect to the statute. The Congressional intent was to comply with the mandates and the decision in Berger.

One of the explicit criticisms in the Berger decision of the New York State Statute as it then existed was the fact that no notice provision was contained in the statute. Subsequent enactment of law both State and Federal contained an explicit provision that every person named in a wire tap order must be given, withi ninety days, a written notice setting forch certain details. That notice was not given. That is in violation of both State and Federal statutes and directly violates the mandate quoted above in Berger v. New York, and requires suppression.

POINT TWO

THE FAILURE TO NAME RALPH PRINCIPIE IN THE ORDERS AS SOON AS IT WAS KNOWN THAT HE WAS PARTICIPATING IN THAT OFFENSE REQUIRED SUPPRESSION

United States v. Donovan 17 Cr L 2027 (March 17, 1975) is a Sixth Circuit decision which was cited above as it related to the suppression of evidence obtained in violation of the Federal Statute as no inventory was filed. However, the second prong of the decision involves a discussion of United States v. Kahn 415 US 143, 94 S.Ct. 977 as it applies to evidence obtained against a known target who is not named in the order.

Ralph Principie became a known participant in the offenses which were the designated offenses in the eavesdropping order as early as July 26, 1972. A direct surveillance of Ralph P rincipie and his Staten Island home had been conducted prior to that date. Only those individuals believed to be participants in the offenses being investigated were the subject of surveillance.

In United States v. Kahn 415 US 143, 94 S.Ct. 977 the warrant in question named only the husband, but conversations of Mrs. Kahn were recorded. The issue presented for determination was whether Mrs. Kahn had to be named in the warrant. Mr. Justice Stewart writing for the court stated the purpose of 18 USC § 2518(1) at page 982:

> "Section 2518(1) of Title 18, United States Code, sets out in detail the requirements for the information to be included in an application for an order authorizing the interception of wire communications. The sole privision pertaining to the identification of persons whose communications are to be intercepted is contained in § 2518(1) (b) (iv), which requires that the application state "the identity of the person, if known, committing the offense and whose communications are to be intercepted." (Emphasis supplied.) This statutory language would plainly seem to require the naming of a specific person in the wiretap application only when law enforcement officials believe that such an individual is actually committing one of the offenses specified in 18 U.S.C.§ 2516.

The Court's conclusion concisely and succinctly stated at

page 984:

> "We conclude, therefore, that Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is "committing the offense" for which the wiretap is sought. Since it is undisputed that the Government had no reason to suspect Minnie Kahn of complicity in the gambling business before the wire interceptions here began, it follows that under the statute she was among the class of persons 'as yet unknown" covered by Judge Campbell's order.

The Police Officers in the case at bar believed Ralph Principie was involved in the offenses which were the subject of the eavesdropping order as early as July, 1972. Ralph Principie is not named in the order signed July 27, 1972, nor September 11, 1972 but is named in three orders thereafter.

If this decision needed clarification or if in fact suppression should be required was part of the deciding factors in United States v. Donovan, supra. This case is so close to the case at bar that it is indistinguishable. It was decided on the two points raised herein: the failure to serve post termination notice and failure to include known suspects in eavesdropping orders.

Chief Judge Phillips writing for the majority expressed the opinion that there is a clear indication in the Kahn opinion that if she had been known suppression would have been required. The Courts opinion at 17 Cr L 2028:

> "The literal language of the identification requirement leaves no question as to when the Government must specifically name the parties. Section 2518 requires that "each application shall include *** the identity of the person, if known, committing the offense, and whose communications are to be intercepted." This requirement is only one of the many specific steps that the Government must follow in order to obtain wiretap authorization, and is a procedural restraint on the use of wiretaps. In our opinion this is not a hollow requirement It is an important part of the statutory framework that Congress

> formulated for protection against the dangers of electronic surveillance. ***
>
> Although the identity provision in the present case plays a different role in the statutory scheme than the provision in Giordano, we are of the opinion that it also plays "a central role." ***
>
> In our view it makes no difference whether the ommision was inadvertent or purposeful. The fact of omission is sufficient to invoke suppression."

In drawing its final conclusion on the question presented the Court stated at page 2028:

> "We draw no inference from the fact that notice was given to 39 other persons, many of whom were known to Merlo and Lauer. Others may have communicated the fact of interception to Merlo and Lauer, but this would not necessarily lead them to believe that they had been intercepted. It is just as reasonable to assume that Merlo and Lauer would believe that, since they had not received notice, their conversations were not intercepted. ***
>
> From our examination of the legislative history of this provision, see U.S. v. Chun, 503 F.2d at 537 n. 6, 539-40, 542 n.12, it is our conclusion that this provision plays a central role in the statutory scheme to limit and control electronic surveillance and that it "directly and substantially implement(s) the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device." United States v. Giordano, 416 U.S. at 527. "

The failure of the prosecution to comply with provisions of Title III and Article 700 that "directly and substantially implements" the Congressional scheme warrants suppression.

CONCLUSION

Appellants motion to controvertand suppress should have been granted: the sentence of the lower court should be vacated, and the indictment dismissed.

RESPECTFULLY SUBMITTED,

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